Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	))))))))	MM Docket No. 92-266

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits comments in response to the Fifth Notice of Proposed Rulemaking released March 30, 1994 in the above captioned proceeding.[1]

INTRODUCTION

In the Fourth Report and Order, the Commission determined that, as a general matter, rates for cable service provided to commercial establishments should be subject to the regulatory regime established by the Commission in implementing the 1992 Cable Act.[2] The Commission indicated that it might consider, on a case-by-case basis, authorizing higher commercial rates

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[1] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, rel. March 30, 1994 ("Fifth Notice" or "Fourth Report and Order").

[2] Id. at ¶ 185.

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provided that such higher earnings were offset by lower rates for residential subscribers.[3]

The regulatory framework being considered by the Commission for commercial rates wanders far afield from both the text and the policies of the 1992 Cable Act. Nothing in the Cable Act evinces any Congressional intent to regulate cable rates paid by commercial establishments, and there is no justification for doing so. Commercial establishments have ready access to alternative distributors of video programming. Moreover, they derive substantial financial benefits from the availability of cable service. Operators should be entitled to reflect these benefits in the rates they charge these establishments.

The Commission's suggestion that operators might be able to charge different rates for commercial establishments if such rates would ultimately yield savings for residential consumers is similarly unhinged from the statutory moorings of the 1992 Cable Act. Congress expressly admonished the Commission to avoid the imposition of telco-like regulation on cable operators. In fact, the Commission's proposal to include commercial establishments within the ambit of rate regulation could have the effect of increasing residential rates by increasing the base of regulated revenue from which rate reductions must be calculated.

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[3] Id. at ¶ 257.

I. THERE IS NO STATUTORY, POLICY, OR ECONOMIC RATIONALE FOR BARRING CABLE OPERATORS FROM CHARGING DIFFERENTIAL RATES TO COMMERCIAL ESTABLISHMENTS

There is no sound statutory or policy rationale supporting the Commission's tentative conclusion that its regulatory framework for cable television should treat commercial establishments the same way as residential subscribers. Numerous provisions in both the text and the legislative history of the 1992 Cable Act manifest Congressional concern with the cable rates paid by residential subscribers.[4/] Indeed, one of the key Senate sponsors of the Cable Act stated that "the basic concept" of the legislation was that "if there is no competition in the provision of multichannel services to the homes of the community, there must be regulation."[5/] Neither the Act nor its legislative history, evince any similar solicitude for the rates paid by commercial establishments.

[4/] See, e.g., 47 U.S.C. § 522(1)(1994 pp) ("the term 'activated channels' means those channels...generally available to residential subscribers..."); 47 U.S.C. § 543(1) (defining "effective competition" by reference to number of "households" accessing and receiving video programming from an alternative multichannel distributor); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1462 § 2(a)(3)&(14)(1992)("1992 Cable Act")(noting increase in number of "households" subscribing to cable); S. Rep. No. 92, 102d Cong., 1st Sess. 8 ("Senate Report")(expressing concern that "only a small percent of the cabled homes" were covered by rate regulation under the Commission's 1991 definition of effective competition); id. at 15 (noting "variety of ways for video signals to be delivered to the home via satellite"); id. at 18 (noting that presently telcos "are incapable of carrying video signals to the home"); see also H.R. Rep. No. 628, 102d Cong., 2d Sess. 30 (discussing the number of "households" served by cable and its competitors).

[5/] 138 Cong. Rec. S672 (daily ed., Jan. 30, 1992) (statement of Sen. Danforth) (emphasis added).

Congress' lack of concern regarding the rates paid by commercial establishments was well-justified. Virtually all commercial establishments have a realistic choice of alternative multichannel programming distributors. Unlike residential subscribers, most commercial establishments possess the financial wherewithal and physical space to purchase satellite earth stations to access programming. Commercial establishments have a distinct advantage over residential consumers since they can treat satellite dish purchases as a tax-deductible business expense and recover the costs of that expense in the prices charged for the services provided to their customers.

The evidence suggests that, in Cablevision's service areas, a substantial portion of the commercial subscriber market takes advantage of its enhanced access to alternative multichannel programming distributors. Of the estimated 1000 bars in Cablevision's Connecticut service area taking service from a multichannel video programming distributor, approximately 200 of them -- <u>20 percent</u> -- use satellite dishes rather than subscribe to cable. Similarly, in Cablevision's Boston franchise areas, about 75 of the 425 bars that provide video programming to their patrons -- more than <u>17 percent</u> -- utilize satellite dishes rather than subscribe to Cablevision's service. Indeed, viewing commercial establishments as a separate and distinct class of subscribers, both cases satisfy the statutory definition of "effective competition" that triggers rate deregulation.[6]

In short, commercial establishments are not the prototypical "captive" residential subscriber whose lack of access to alternative multichannel programming distributors motivated Congress to enact the 1992 Cable Act.[7] Regulation of commercial cable rates militates against the accomplishment of the paramount objective of the 1992 Cable Act: ensuring competitive cable rates by the least intrusive means possible.[8]

The Commission's tentative decision to opt for equivalent treatment also overlooks the sound business and financial reasons for charging differential rates to commercial subscribers. Unlike residential subscribers, commercial establishments derive a substantial and cognizable financial benefit from subscribing to cable. The broad array of programming available on cable -- particularly sports programming -- helps to attract patrons to

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[6] See 47 U.S.C. § 543(1)(defining effective competition as 15% market penetration by an alternative multichannel programming distributor).

[7] See, e.g., 1992 Cable Act at § 2(a)(2) (expressing concern that most cable television subscribers have no opportunity to select between competing multichannel program distributors); see also Senate Report at 11 ("When there are alternative sources of programming reasonably available to the consumer, there will be little need, if any, to regulate a cable system's rates.").

[8] 47 U.S.C. § 543(a) & (b)(2).

bars and restaurants.[9] If a local sports team is playing a televised game on a particular evening, bar and restaurant owners know that exhibiting that game in their establishment can help them attract and retain patrons. Many bars and restaurants add cable television -- and tout its availability in advertising and marketing materials -- in order to draw customers who would otherwise be unable to view a program or sporting event in their home.

Thus, these establishments realize a direct financial benefit from subscribing to cable.[10] The Commission would artificially and unfairly constrain operators by precluding them from setting commercial rates that reflect the value of their service to commercial establishments.

The Commission's rule also ignores the fact that the use of cable service by commercial establishments can drain revenue from cable operators. For example, some sports fans may forego cable subscriptions in lieu of going to a bar two or three times a month to view games that can only be seen on cable. In these instances, the bar owner gains business from having cable, while

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[9] Just this month, a number of bars and restaurants in Cablevision's New England territory have communicated to the company the need for access to ESPN in order to attract customers and tourists interested in watching the World Cup soccer tournament. In one instance, Cablevision learned that twenty people left a restaurant after discovering that the World Cup telecast was not available.

[10] One Boston bar owner recently indicated to Cablevision that the unavailability of a single Boston Red Sox baseball game caused him to lose $200-300 in bar revenue.

the operator loses revenue which could not be recovered from the commercial establishment under the Commission's tentative rule.

Finally, the Commission's rule also fails to account for the fact that some programmers charge operators different rates for commercial and residential subscribers.[11] These differential rates reflect the commercial benefit derived by "sports bars" and other commercial establishments from the exhibition of cable programming. Under the Commission's rule, however, operators would be forced to absorb the higher rates they pay for programming they distribute to commercial establishments. The result would be a significant decline in operator revenue and earnings, with no corresponding benefit for subscribers. Indeed, the Commission's rule -- when coupled with the traditional premium paid by operators for distribution of programming to commercial establishments -- may render the continued provision of cable service to commercial establishments financially untenable.

II. THERE IS NO AUTHORITY OR JUSTIFICATION FOR THE COMMISSION TO REQUIRE OPERATORS CHARGING COMMERCIAL ESTABLISHMENTS NON-BENCHMARK RATES TO OFFSET THEIR EARNINGS WITH LOWER RATES FOR RESIDENTIAL SUBSCRIBERS

The Commission has suggested it might permit the provision of cable service to commercial establishments at non-benchmark rates on the condition that "higher earnings for commercial establishments should be offset by lower rates to other

[11] One programmer carrying sporting events charges cable operators more than ten times as much for distribution of its channel to commercial subscribers than for distribution to residential subscribers.

subscribers."[12] This approach apparently rests on the assumption that any revenues in excess of the benchmark obtained by operators from commercial establishments constitutes "surplus" earnings that should presumptively be withheld from operators. As demonstrated above, there is no empirical or economic basis for such an assumption. Rather, there are strong business and financial reasons why operators historically have utilized different rate structures for commercial establishments and residential subscribers.

There is absolutely no statutory foundation for the Commission's misguided proposal to formally link higher commercial rates to lower residential rates. Nothing in the 1992 Cable Act authorizes the Commission to impose upon cable the same kind of entangled cross-subsidy between commercial and residential subscribers that has evolved in telephony.[13] To the contrary, a cross-subsidization requirement would violate

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[12] Fifth Notice of Proposed Rulemaking at ¶ 257.

[13] In the context of telephony, ironically, the Commission has consistently attempted to eliminate or minimize these historic cross-subsidies. See, e.g., Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd. 334, 337-338 (1993) (recommending a cap on interexchange carriers' contributions to the Universal Service Fund); Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369, 7436-7438 (1992), rev'd on other grounds, Bell Atlantic Cos. v. FCC, No. 92-1619 (D.C. Cir., Jun. 10, 1994) (finding no basis for requests by local exchange carriers to require a contribution charge from competitive access providers); Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd. 665, 669 (1991) (segregating business and residential services into separate "baskets" to minimize cross-subsidies); MTS and WATS Market Structure, 2 FCC Rcd. 2953, 2957 (1987) ("cost-based telecommunications pricing is well worth achieving").

Congress's admonition that the Commission not "replicate Title II regulation."[14] The inherent complexity of implementing and enforcing such a requirement, moreover, would violate the statutory mandate that "governmental oversight of the cable industry . . . should be the minimum necessary" to ensure competitive rates.[15]

The Cable Act only authorizes the Commission to ensure reasonable rates for cable service, and the Commission has adopted a regulatory framework intended to meet that objective. There is no authority in the Cable Act to force operators to reduce rates below a reasonable level by requiring them to offset higher commercial rates with lower rates for other subscribers.

In fact, the Commission's proposal to include commercial establishments within the ambit of rate regulation could have the effect of increasing residential rates by increasing the base of regulated revenue from which rate reductions must be calculated. If revenues from commercial establishments were treated as "regulated revenues" for purposes of calculating rates for regulated services -- as they would seemingly have to be if these establishments were brought within the ambit of rate regulation -- the result would be to increase the per-subscriber revenues from regulated services as of September 30, 1992. From that higher base, the 17 percent rate reduction mandated by the Commission would yield a higher residential rate than if the

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14/ House Report at 83.

15/ Senate Report at 18.

reduction were calculated from the base of per-subscriber revenues derived solely from the provision of service to residential customers. Such a result is presumably the opposite of what the Commission intends.

CONCLUSION

For the foregoing reasons, the Commission should withdraw its proposal to subject the provision of cable service to commercial establishments to the same benchmark formula developed for residential subscribers.

Respectfully submitted,

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